



MERIT SYSTEMS PROTECTION BOARD

Agency Information Collection Activities; Proposed Collection

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506 and 3507), the Merit Systems Protection Board (MSPB or Board) announces that an Information Collection Request (ICR) was forwarded to the Office of Management and Budget (OMB) for review and approval. The ICR is for MSPB's revised Appeal Form (MSPB Form 185). We request public comments on the revised form, which is available for review (along with the comments previously received) on MSPB's website at <http://www.mspb.gov/appeals/revisedappealform.htm>.

DATES: Written comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, Attention: Desk Officer for the Merit Systems Protection Board, or send them via electronic mail to oir_submission@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419; telephone 202-653-7200; fax 202-653-7130; email mspb@mspb.gov. Persons without Internet access may request a paper copy of MSPB Form 185 from the Office of the Clerk of the Board.

Revised MSPB Appeal Form 185

On December 3, 2012, MSPB published a 60-day notice in the Federal Register (77 FR 71640) of our intent to submit this proposed information collection to OMB for review and approval. The MSPB received a number of comments regarding its proposed revisions to MSPB Form 185 from Federal agencies, employees, attorney associations, and individual representatives. The revisions to the form include streamlining and reorganizing the introductory instructions; updating appellant/agency information; clarifying hearing request information; providing information regarding affirmative defenses and particular classes of appeals (Individual Right of Action (IRA), Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), and Veterans Employment Opportunities Act of 1998 (VEOA)) in a new Appendix A; consolidating certain sections and eliminating others as superfluous; and providing full contact information for each of the Board's regional and field offices in a new Appendix B.

The following sentence has been added to the section, "Time Limits for Filing an Appeal," on page 1: "The 30-day time limit may also be extended if you have previously filed a formal equal employment opportunity (EEO) complaint regarding the same matter, as described in **Appendix A.**"

Instructions about which parts of the form must be completed for particular classes of appeals were added, and references to requested documents in boxes 16 and 18 were bolded for added visibility. In addition, language in box 16 has been changed to read, as follows: "Explain briefly why you think the agency was wrong in taking this action, including whether you believe the agency engaged in harmful procedural error, committed a prohibited personnel practice, or engaged in one of the other claims listed in **Appendix A. Attach the agency's proposal letter, decision letter, and SF-50, if available.** Attach additional sheets if necessary (bearing in mind that there will be later opportunities to supplement your filings)."

Language in box 26, requesting information regarding a designated representative, has been changed to read as follows: "Has an individual or organization agreed to represent you in this proceeding before the Board? (You may designate a representative at any time. However, it is unlikely that the appeals process will be delayed for reasons related to obtaining or maintaining representation. Moreover, you must promptly notify the Board in writing of any change in representation.)"

Appendix A: The second sentence under the heading, “Prohibited Personnel Practices,” has been changed to read as follows: “Among the prohibited personnel practices most likely to be relevant as an affirmative defense in an MSPB proceeding are: unlawful discrimination under subsection **(b)(1)**; retaliation for protected whistleblowing under subsection **(b)(8)**; and retaliation for other protected activity under subsection **(b)(9)**.”

In order to include additional bases of prohibited discrimination and their corresponding statutory foundation, the heading, “Unlawful Discrimination,” has been changed to read as follows: “A claim that the agency action was the result of prohibited discrimination based on race, color, religion, sex, national origin, disability, age, marital status, political affiliation, genetic information, and retaliation for prior EEO activity. See [5 U.S.C §§ 2302\(b\)\(1\)](#) and [7702; 5 C.F.R. Part 1201, Subpart E; 29 C.F.R. Part 1630](#) and [Appendix to Part 1630; 42 U.S.C. § 2000ff et seq.; 29 C.F.R. § 1614.302-.308](#). If you filed a formal discrimination complaint, give the date on which you did so, state whether and when the agency issued a final decision on your discrimination complaint, and provide copies of both.”

In order to include new provisions introduced by passage of the Whistleblower Protection Enhancement Act (WPEA), the title and content of the headings, “Retaliation for whistleblowing activity under 5 U.S.C. § 2302(b)(8),” and “Retaliation for other protected activity under 5 U.S.C. § 2302(b)(9),” have been changed to read as follows:

“Retaliation for whistleblowing activity under [5 U.S.C. § 2302\(b\)\(8\)](#) and [\(b\)\(9\)\(A\)\(i\), \(B\), \(C\), or \(D\)](#): A claim that the agency action was taken in retaliation for the disclosure of information the individual reasonably believes demonstrates a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety, or in retaliation for exercise of the right to appeal, complain, or grieve an alleged violation of Subsection **(b)(8)**; for testifying or otherwise lawfully assisting another’s right to appeal, complain, or grieve such an alleged violation; for cooperating with or disclosing information to the Inspector General or Special Counsel in accordance with applicable provisions of law; or for refusing to obey an order that would require a violation of law. See [5 C.F.R. § 1209.4\(b\)](#).

“Retaliation for other protected activity under [5 U.S.C. § 2302\(b\)\(9\)\(A\)\(ii\)](#): A claim that the agency action was taken in retaliation for the exercise of a right, other than with regard

to remedying an alleged violation of [5 U.S.C. § 2302\(b\)\(8\)](#), such as the filing of an appeal, complaint, or grievance.”

The first paragraph under the hearing, “**IRA, USERRA, and VEOA Appeals**,” has been changed to read as follows:

“The law provides for three types of appeals in certain situations that might not otherwise be appealable to the MSPB (See [5 C.F.R. § 1201.3\(a\)](#) for a list of otherwise appealable actions): Individual Right of Action (IRA) appeals under the Whistleblower Protection Act (WPA) and Whistleblower Protection Enhancement Act (WPEA) pursuant to [5 U.S.C. § 1221](#); appeals under the Uniformed Services Employment and Reemployment Rights Act (USERRA) pursuant to [38 U.S.C. § 4324](#); and appeals under the Veterans Employment Opportunities Act (VEOA) pursuant to [5 U.S.C. § 3330a](#).

Note: As previously set forth, allegations of retaliation for whistleblowing, as well as allegations under USERRA and VEOA, may be brought as additional claims in cases that are otherwise appealable to the Board.”

Also reflecting changes arising from passage of the WPEA, the title and content of the heading, “IRA Appeals under the Whistleblower Protection Act,” has been changed to read as follows:

“**IRA Appeals under the WPA and WPEA.** Subsection (b)(8) of [5 U.S.C. § 2302](#) makes it a prohibited personnel practice to threaten, propose, take, or not take a personnel action listed in [5 U.S.C. § 2302\(a\)\(2\)](#) because of an individual’s disclosure of information that he or she reasonably believes shows a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. [Subsections \(b\)\(9\)\(A\)\(i\), \(B\), \(C\), and \(D\)](#) make it a prohibited personnel practice to threaten, propose, take, or not take a personnel action because an appellant exercised the right to appeal, complain, or grieve an alleged violation of Subsection (b)(8); testified or otherwise lawfully assisted another’s right to appeal, complain, or grieve such an alleged violation; cooperated with or disclosed information to the Inspector General or Special Counsel in accordance with applicable provisions of law; or refused to obey an order that would require a violation of law. See [5 C.F.R. § 1209.4](#). If the personnel action allegedly taken in reprisal for making a protected disclosure or engaging in protected activity is not otherwise appealable to the Board, you must first file a whistleblower complaint with the Office of Special Counsel (OSC) and exhaust the

procedures of that office, *see* [5 U.S.C. § 1214\(a\)\(3\)](#), before you may file an IRA appeal with the Board under [5 U.S.C. § 1221](#).”

Finally, instructions regarding the impact of filing a formal EEO complaint on the Board’s timeliness requirements are included under the heading, “**Time Limits for filing IRA, USERRA, and VEOA Appeals, and following the filing of a Formal EEO Complaint**,” as follows: “**Formal EEO Complaints**. If you have previously filed a formal Equal Employment Opportunity (EEO) complaint regarding the same matter, you must file your Board appeal within 30 days after receiving the agency’s resolution or final decision as to that complaint, or you may file at any time after 120 days have elapsed from the filing of the complaint in the absence of such an agency resolution or decision. *See* [5 C.F.R. 1201.154\(b\)](#).”

Estimated Reporting Burden

In accordance with the requirements of the PRA, MSPB is soliciting comments on the public reporting burden for this information collection. The public reporting burden for this collection of information is estimated to vary from 20 minutes to 4 hours, with an average of 60 minutes per response, including time for reviewing the form and instructions, searching existing data sources, gathering the data necessary, and completing and reviewing the collection of information.

Specifically, MSPB invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of MSPB's functions, including whether the information will have practical utility; (2) the accuracy of the MSPB's estimate of burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Estimated Reporting Burden

5 CFR parts	Annual number of respondents	Frequency per response	Total annual responses	Hours per response (average)	Total hours
1201, 1208 and 1209.....	7,150	1	7,150	1.0	7,150

William D. Spencer
Clerk of the Board
[Billing Code 7400-01-P]

[FR Doc. 2013-07692 Filed 04/02/2013 at 8:45 am; Publication Date: 04/03/2013]